

State of Wisconsin\Government Accountability Board

Post Office Box 7984
212 East Washington Avenue, Third Floor
Madison, WI 53707-7984
Voice (608) 266-8005
Fax (608) 267-0500
E-mail: gab@wisconsin.gov
<http://gab.wi.gov>



JUDGE DAVID G. DEININGER
Chair

KEVIN J. KENNEDY
Director and General Counsel

October 22, 2012

Richard M. Esenberg
President and General Counsel
Wisconsin Institute for Law & Liberty, Inc.
1139 E. Knapp Street
Milwaukee, WI 53202-2828

Dear Mr. Esenberg:

Thank you for your October 18, 2012 letter which raised concerns about the rights and responsibilities of election observers. You have asked the Government Accountability Board (G.A.B.) to correct or clarify statements made by the G.A.B. staff with respect to the use of electronic documents for in-person absentee and same day registration, in addition to the G.A.B. guidance on the conduct of election observers.

The G.A.B. policies with respect to activity by members of the public observing elections are based on state law which permits any member of the public, other than a candidate whose name appears on the ballot, to be present to observe the voting process. Wis. Stat. §7.41(1). The municipal clerk or chief inspector may restrict the areas within a polling place where observers may be stationed. The designated areas are required to be clearly delineated. The observation areas should be established so that a member of the public may readily observe all public aspects of the voting process. Wis. Stat. §7.41(2).

The rights of observers must, however, be applied consistent with other election laws. Wis. Stat. §§5.35(5) and 7.37(2), expressly authorize and require clerks and election officials to maintain order and obedience to their lawful commands, prevent disorderly conduct of electors or observers, prevent interruptions or disturbances, and prevent interference with and distraction of the voters. The balance of this correspondence attempts to outline in more detail the G.A.B.'s application of the relevant statutes and to address your concerns.

Consistent with the intent of Wis. Stat. §7.41, the G.A.B. agrees that public observation of the voting process is an important aspect of ensuring the transparency and integrity of elections. The statutory provisions do not specify what conditions constitute "readily observe all public aspects of the voting process." The administrative rules and policies initiated by the G.A.B. provide notice to observers, poll workers and voters regarding what is and is not acceptable conduct at the polls.

A polling place may have separate designated areas for observing Election Day registration and voting, including accommodating possible challenges to voters. Members of the public should be able to observe that poll workers are reviewing the registration form and any required proof of residence document; checking the ineligible voter list for new registrants; asking for a voter's name and address and requiring a voter's signature on the poll list before assigning a voter number and issuing a ballot; and making notations on a poll list for absentee voters and

voters requiring assistance, or for ballots taken to the entrance of a polling place because the voter was unable to enter the polling place due to disability.

These polling place activities have an audio component that is part of the observation process. Observers are entitled to hear a voter state their name and address before receiving a voter number and ballot, and to hear the poll worker announce the receipt of a ballot at the entrance of a polling place or the name of any absentee voter when the absentee certificate envelope is opened. See Wis. Stat. §§6.79 (1)(a)6.82 (1)(a), 6.88 (3)(a).

But I must respectfully disagree with your assertion that observing the public aspects of the voting process means an observer has the right to see in detail every document exchanged between voters and poll workers and to approve, verify, or contest each step of the interaction between a poll worker and a voter. The Board's view has been that readily observing the public aspects of the voting process does not include being positioned to see details such as the completed voter registration form or what voter number was recorded on the poll list, the quality of the voter's signature, or the details of any notation such as a driver's license number or an account number for another proof of residence document.

Similarly, Wis. Stat. §7.41 does not require poll workers to stop what they are doing and show observers the voter registration forms, the Inspectors' Statement, the poll list, tally sheets or other documents prepared or processed during the course of Election Day. Examination of the official documents prepared and handled by poll workers is limited by the fact that poll workers have to conduct and administer the election. While Election Day documents are public records subject to inspection, there is no statutory duty to produce or display them in the midst of the voting process, and there are countervailing reasons not to follow that proposed practice. Examination of those documents at a busy polling place inevitably not only causes interference with voters and disruption to the election, it would bring the voting process to a standstill.

Poll workers are not the custodian of the public election-related documents used at the polling place. Given the large number of voters expected at the polling place on November 6, 2012, the right to inspect public election-related documents will be limited, and will more likely occur after Election Day in the office of the custodian of the records, the municipal or county clerk. In addition, the actual custodian has to conduct a balancing test to determine what information on the Election Day documents may need to be redacted. This cannot be done at the polling place.

In short, our application of the law does not permit observing the public aspects of the voting process in an up-close manner, or looking over the shoulder of the poll workers, or interfering or distracting the voters. The voting process is readily observable even if the detailed documentation cannot be reviewed until after Election Day by an inspection of the public documents.

In your correspondence you specifically raise questions about the application of the "six-foot" rule and assert that it compromises the rights of observers. As background, the "six-foot" rule was established as part of a set of emergency administrative rules adopted by the former State Elections Board and the Government Accountability Board. Specifically, the Government Accountability Board published the observer rules first in 2008 and then again in 2010, with

many opportunities for public comment, which resulted in some revisions to the observer policies.

The six- to twelve-foot distance contained in the rules was developed over the past four years in consultation with organizations, including the two major political parties, which regularly train and deploy observers to polling places and with the input of local election officials. The language of the rule recognizes that this distance may need to be adjusted depending on unique circumstances related to any given polling location, such as unusual noise levels or blocked sight lines for example. For all practical purposes the “six-foot” rule operates as a guideline for designating observation areas; it is not absolute. This process has worked well in all elections since it was first implemented.

I would also note that Wis. Stat. §7.41 does not articulate the level of close observation you propose, and it was the new version of the administrative rule which expanded the ability of observers to view the election and the absentee voting process. The previous version of the administrative rule, for instance, limited observers to nonpartisan and bipartisan organizations, required observers to seek the Board’s authorization 45 days in advance of an election, and required observers to transmit completed observation logs to the Board. The rules under which observers currently operate are less restrictive and ensure more specific access while also protecting the ability of poll workers to conduct an orderly election and the rights of voters to cast their ballots in a calm environment.

Your letter also objects to the Board’s approval of the use of electronic forms of proof of residence documents as part of the voter registration process. As you are aware, the Board made that determination at its meeting of August 23, 2012. We have provided specific guidance to local clerks regarding the handling of electronic proof of residence documents, which may be found at <http://gab.wi.gov/node/2603>. That guidance implements the Board’s directive and ensures that these electronic documents will be processed consistently throughout the State. It is currently being followed by clerks in conducting voter registration and in-person absentee voting. I believe it would not be a wise decision to revisit and rescind the Board’s determination two weeks before the General Election.

The guidelines in place and described in a number of G.A.B. communications and training materials provide the required ability for members of the public to readily observe the public aspects of the voting process set out in Wis. Stat. §7.41. If a member of the public observes something that is contrary to law, it should be brought to the chief inspector’s attention. If it is not addressed, the observer should contact the municipal clerk or the Government Accountability Board. Our office maintains a fully-staffed Help Desk throughout Election Day.

As part of our Back-to-Basics Initiative for preparing local election officials, poll workers, and the general public for the November 6th election, our staff has been distributing additional training materials for election officials. These materials clarify issues that have been identified following the most recent round of elections. You can access training webinars for local election officials on our website: <http://gab.wi.gov/clerks/education-training/webinars>.

I appreciate that you brought your concerns about these issues to our attention. We have provided a copy of your October 18, 2012 letter to Members of the Government Accountability Board as part of the materials for its next meeting. Those materials contain additional detailed

information about the issues you raise. The Board will review these high profile issues along with its longstanding guidance regarding observers at its October 23, 2012 meeting. Please feel free to offer any additional comments at that meeting, or to contact me directly at 608-261-8683, or Kevin.Kennedy@wi.gov if you have any additional questions.

Government Accountability Board

A handwritten signature in black ink that reads "Kevin J. Kennedy". The signature is written in a cursive, flowing style with a large, prominent "K" and "J".

Kevin J. Kennedy
Director and General Counsel

C: Members, Wisconsin Government Accountability Board